

FACTUAL HISTORY

On November 10, 2005 appellant, then a 44-year-old mail carrier, filed a traumatic injury claim alleging that on November 5, 2005 she sustained stress, anxiety, a swollen right cheek, nausea and a headache after she was struck on the face by an assailant in the performance of duty. She stopped work on November 7, 2005 and did not return. The Office accepted the claim for a contusion of the face, scalp and neck and post-traumatic stress disorder. It paid appellant compensation at the three-fourths rate, or 75 percent of the applicable pay rate, for claimants with dependents beginning December 22, 2005.

On May 8, 2006 the Office notified appellant that it was placing her on the periodic rolls effective April 16, 2006. It informed her that she should notify the Office by letter of any changes in the status of dependents.

In a Form EN1032 dated August 19, 2006, appellant indicated that her husband did not live with her and she did not make regular payments for his support. She did not claim compensation due to other dependents. The Form EN1032 explained that compensation was paid at 66 2/3 percent of the applicable pay rate if the claimant had no dependents and at 75 percent if the claimant had one or more dependents. The Form EN1032 further provided that a dependent included a husband who resided with the claimant or received direct payments for support, an unmarried child under the age of 18 or an unmarried child over the age of 18 who either attended school full time or was unable to support himself or herself because of a disability.

On March 17, 2008 the Office notified appellant that she may have received an overpayment of compensation and requested her children's dates of birth. It also requested addition information regarding her separation and divorce.² On April 8, 2008 appellant advised that her son was born June 10, 1985 and her daughter September 1, 1988. She separated from her husband on September 1, 2006. Appellant did not make support payments. She and her husband divorced on November 15, 2007.

By letter dated May 1, 2008, the Office requested information regarding whether appellant's children attended school. Appellant responded that her son graduated from high school in June 2003 and her daughter in June 2006.

On June 18, 2008 the Office notified appellant of its preliminary determination that she received an overpayment of \$6,202.77 because she received compensation at the augmented rate from September 1, 2006 to March 15, 2008. It determined that it paid appellant \$50,998.30 in compensation for the period September 1, 2006 through March 15, 2008 at the three-quarters augmented rate. The Office calculated that it should have paid her \$44,795.53 in compensation during this time at the two-thirds rate applicable for claimants without dependents. It further notified her of its preliminary determination that she was at fault in creating the overpayment. The Office attached appeal rights to the preliminary overpayment notification. By decision dated

² By decision dated March 17, 2008, the Office terminated appellant's entitlement to compensation effective March 17, 2008 on the grounds that the weight of the evidence established that she had no further employment-related condition.

July 16, 2008, it finalized its finding that she received an overpayment of \$6,202.77 and that she was at fault in its creation. On July 16, 2008 appellant requested reconsideration of the June 18, 2008 preliminary determination of overpayment. Appellant also requested a telephone conference. She submitted financial information.

On July 28, 2008 the Office issued another preliminary determination of overpayment that superseded the June 18 and July 17, 2008 preliminary determination of overpayment and overpayment decision. It noted that it had erroneously included appeal rights with the June 18, 2008 preliminary overpayment finding. The Office informed appellant again of its preliminary determination that she received a \$6,202.77 overpayment as she received compensation from September 1, 2006 to March 15, 2008 at the three-quarters rather than the two-thirds rate and that she was at fault in creating the overpayment. It requested that she complete an enclosed overpayment action request if she still desired a telephone conference on the July 28, 2008 preliminary determination of overpayment. The Office further requested that appellant complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally, it notified her that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a precoupment hearing.

By decision dated August 27, 2008, the Office finalized its finding that appellant received an overpayment of \$6,202.77 because it paid her compensation at the augmented rate from September 1, 2006 to March 15, 2008 rather than the rate applicable for claimants without dependents. It further finalized its determination that she was at fault in the creation of the overpayment. The Office requested that she submit a check for the full amount as repayment.

LEGAL PRECEDENT -- ISSUE 1

The Federal Employees' Compensation Act³ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁴ If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability.⁵ Where the employee has one or more dependents as defined in the Act, he or she is entitled to have his or her basic compensation augmented at the rate of 8 1/3 percent, for a total of 75 percent of monthly pay.⁶ A dependent includes a student, which under 5 U.S.C. § 8101 means an individual under 23 years of age who has not completed four years of education beyond high school and is pursuing a full-time course of study.⁷ If a claimant receives augmented compensation during a period where he has no eligible dependents, the difference between the compensation he was entitled to receive at the two-thirds compensation rate and the augmented compensation received at the

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8105(a).

⁶ *Id.* at § 8110(b).

⁷ *Id.* at § 8110(a).

three-quarters rate constitutes an overpayment of compensation.⁸ Section 8110(a)(2) of the Act provides that a husband qualifies as a dependent if he is a member of the same household as the employee or is receiving regular contributions from the employee for his support or the employee has been ordered by a court to contribute to his support.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment in the amount of \$6,202.77. Appellant separated from her husband no later than September 1, 2006 and her youngest child turned 18 on September 1, 2006.¹⁰ She did not make regular support payments to her husband and her children did not attend school. Appellant, consequently, was not entitled to receive compensation at the augmented three-fourths rate for claimants with dependents after September 1, 2006. The Office, however, continued to pay her compensation at the augmented three-fourths rate through March 15, 2008. It paid appellant \$50,998.30 in compensation from September 1, 2006 through March 15, 2008 instead of the proper amount of \$44,795.53 for claimants without dependents. The Office properly determined that she received an overpayment of \$6,202.77, the difference between the amount of compensation that she actually received and the amount of compensation that she was entitled to receive.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of the Act¹¹ provides that “[a]djustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.” Section 10.433 of the Office’s implementing regulations¹² provide that in determining whether a claimant is at fault, the Office will consider all pertinent circumstances. An individual is with fault in the creation of an overpayment who:

“(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

“(2) Failed to provide information which he or she knew or should have known to be material; or

“(3) Accepted a payment which he or she knew or should have known to be incorrect.”

⁸ *Diana L. Booth*, 52 ECAB 370 (2001).

⁹ 5 U.S.C. § 8110(a)(2); *Nancy J. Masterson*, 52 ECAB 507 (2001).

¹⁰ Appellant indicated that on the August 19, 2006 EN1032 form that she and her husband were separated. On April 8, 2006 she informed the Office that she and her husband separated on September 1, 2006.

¹¹ 5 U.S.C. § 8129(b).

¹² 20 C.F.R. § 10.433.

ANALYSIS -- ISSUE 2

The Office found that appellant was at fault in the creation of the overpayment because she accepted a payment which she knew or should have known to be incorrect. In order for the Office to establish that appellant was with fault in creating the overpayment of compensation, the Office must show that, at the time appellant received the compensation checks in question, she knew or should have known that the payment was incorrect.¹³ With respect to whether an individual is with fault, section 10.433(b) of the Office regulations provide that whether or not the Office determines that an individual was with fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁴

The Board finds that appellant was at fault in creating the overpayment from September 1, 2006 through March 15, 2008. On May 8, 2006 the Office advised her that she should notify it by letter of any changes in dependents. Appellant completed a Form EN1032 on August 19, 2006 which provided her with the definition of a dependent and explained that she was not entitled to receive compensation at the augmented rate if she did not have dependents. She indicated that she and her husband had separated and she did not make payments for his support. Appellant did not claim any other dependents and the record indicates that her daughter turned 18 on September 1, 2006. By receiving the May 8, 2006 letter and signing the Form EN1032 on August 19, 2006, she had notice that she was not entitled to compensation at the augmented rate if she did not have a dependent. Appellant thus knew or should have know that the compensation she received after September 1, 2006 was incorrect as she had separated from her husband and her youngest child was 18 years old and not a student. Even if an overpayment resulted from negligence by the Office, this does not excuse a claimant from accepting payment that the claimant knew or should have been expected to know was incorrect.¹⁵ As appellant is not without fault in the creation of the overpayment, she is not eligible for waiver of the recover of the overpayment. The Office is required by law to recover the overpayment.¹⁶

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$6,202.77 for the period September 1, 2006 to March 15, 2008 because she received compensation at the augmented rate. The Board further finds that the Office properly found that she was at fault in creating the overpayment.

¹³ See *Otha J. Brown*, 56 ECAB 228 (2004); *Karen K. Dixon*, 56 ECAB 145 (2004).

¹⁴ 20 C.F.R. § 10.433(b).

¹⁵ *Danny E. Haley*, 56 ECAB 393 (2005).

¹⁶ No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment. *L.J.*, 59 ECAB __ (Docket No. 07-1844, issued December 11, 2007). With respect to recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits under the Act. *L.D.*, 59 ECAB __ (Docket No. 08-678, issued August 7, 2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 27, 2008 is affirmed.

Issued: March 5, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board